No. 13525

In the United States Court of Appeal for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDE

ON PETITION FOR ENFORCEMENT OF AN ORDER OF TH NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on a petition of the National Labor Relations Board for enforcement of its order issued against respondent on March 31, 1952, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Section 151, *et seq.*), herein called the Act.[1] The Board's Decision and Order (R. 92–97) are reported at 98 NLRB No. 146. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor prac-

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 22–23.

tices in question having occurred at San Diego, California, within this judicial circuit.[2]

STATEMENT OF THE CASE

I

The Board's findings of fact and conclusions of law [3]

Following the usual proceedings under the Act, the Board found that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, and that respondent discriminatorily discharged Cosby M. Newsom in violation of Section 8 (a) (3) of the Act. The subsidiary facts upon which these findings rest may be summarized as follows:

A. The technicians' organizational activities; respondent's warning of reprisals

At all times material to this case, respondent employed five instrument technicians in its electrical production department: Thomas Fowler, Roy Shroble, Ollie Webb, Tony Botwinis, and Cosby Newsom. In the fall of 1950, employee Newsom returned to work after a visit to Los Angeles and informed his fellow technicians at respondent's San Diego plant

[2] Respondent is a California public utility corporation engaged in supplying illuminating gas and electricity for industrial, commercial, and domestic use to the residents of the city and county of San Diego, California. No jurisdictional issue is presented since respondent admits that it is engaged in commerce within the meaning of the Act (R. 5).

[3] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with but slight modification, noted in its decision (R. 93–94). In the following statement references preceding the semicolon are to the Board's findings. Those following the semicolon are to the supporting evidence.

that persons doing similar work in Los Angeles received a higher rate of pay. Someone pointed out that the workers in Los Angeles belonged to a union, while those in San Diego did not (R. 12; 104–105).

For reasons not here material, the question of the instrument technicians' joining a union lay dormant until just prior to January 15, 1951. On that day employee Newsom, in the presence of employees Fowler and Shroble, told Harold L. Warden, respondent's instrument engineer and the technicians' immediate supervisor, that they planned to ask the International Brotherhood of Electrical Workers, Local No. 465, herein referred to as the Union, to represent the instrument technicians in seeking higher wages (R. 12; 106–107). Warden sympathized with them and offered to assist their organizational efforts (R. 12; 107, 161, 182, 203).

Warden then told Joseph L. Kalins, efficiency engineer and Warden's immediate superior, that the instrument technicians intended to join the Union. Together Kalins and Warden went to the office of Charles R. Hathaway, superintendent of respondent's electrical department and their immediate superior, and told him of the instrument technicians' intentions. Hathaway at once requested that the instrument technicians be brought to his office (R. 13; 203, 363).

Before the technicians appeared in answer to this request, Hathaway consulted Noble, respondent's general superintendent, and was told by Noble that "the Company might have certain reservations concerning the instrument men becoming members of the Union" (R. 28; 377–378).

Meanwhile, Warden notified all five instrument technicians of the meeting with Hathaway, and on the afternoon of January 15, the technicians, Warden and Kalins, met in Hathaway's office (R. 13; 109–110, 161, 173, 182). Hathaway opened the meeting by inquiring who was the employees' spokesman. There was no official spokesman, but Newsom was the first employee to speak and did most of the talking for the employees (R. 13; 110, 162, 179, 204–205). Hathaway was told, in answer to his inquiries, that there was no grievance other than the wage question and that the instrument technicians thought they could not obtain a raise through normal Company channels (R. 13–14; 364). Hathaway stated that he thought their chance of obtaining a raise would be better through Company channels because the Union might not be able to act for a long time (R. 14; 364). He also said that the Company might have objections to their joining the Union because of the nature of their jobs. It was pointed out in this regard that some of the technician's work was "confidential" (R. 14; 111). And, finally, Hathaway suggested that the technicians "think this matter over very carefully" because by union membership the men might lose certain advantages and privileges they then had (R. 14; 110, 173, 183, 365). As the meeting closed, the technicians stated that they would discuss the matter and come to a decision (R. 14; 365).

Immediately after the meeting, all five instrument technicians decided to join the Union. Accordingly, Newsom drafted an appropriate petition, which was signed by each technician and certified by a notary

public (R. 14–15; 111–113). Copies were sent to Respondent's vice president, E. D. Sherwin, and to the Union (R. 15; 113–114).

The following morning, January 16, Newsom, Fowler, and Shroble told Warden as they reported for work that they had petitioned for union representation. Warden, in contrast to his sympathetic attitude of the day before, now seemed pessimistic. He said, in effect, that things did not look "too good" (R. 15; 114) for the technicians, that there would be strong opposition to their efforts to organize, and that they should get their affairs in order because they might have to look for new work (R. 15; 114–115, 163, 168, 184). Warden also suggested that with their qualifications they might find it difficult to compete for jobs in the market (R. 16; 148). The technicians told Warden that they would look for other jobs if necessary, but would first complete their organizational drive (R. 16; 115, 184).

The Board, adopting the Trial Examiner's findings as to credibility,[4] concluded that by these threatening statements respondent interfered with, restrained, and coerced its employees and thus violated Section 8 (a) (1) of the Act.

B. Respondent discharges Newsom because of his union activities

Soon after learning of the technicians' decision to organize, Superintendent Hathaway discussed the matter with General Superintendent Noble and asked Noble's permission to terminate the employment of

[4] The Trial Examiner discredited Warden's testimony that he only advised the technicians to prepare a "case" substantiating their demands for a wage increase (R. 17).

Newsom, who, he stated, was unsatisfactory. Noble instructed him that regardless of the organizational activities, Hathaway should discharge Newsom if he was unsatisfactory and that he would leave it to the judgment of "the department" as to whether Newsom was satisfactory (R. 28; 371, 378).

On January 30, 1951, 2 weeks after respondent learned of the technicians' union activity, Hathaway held a periodic departmental meeting with the chiefs of respondent's B and Silver Gate stations, Kenneth Campbell and Walter S. Zitlaw (R. 18; 210–211). By special arrangement, Kalins and Warden also attended and outlined a projected training program for the instrument technicians, which was discussed and adopted. At the conclusion of this, according to the testimony of Hathaway and respondent's other representatives, Hathaway asked how the men were performing their work, and Warden replied that all were satisfactory except Newsom (R. 18–19; 210, 211, 332, 366, 386, 402). The discussion then centered on Newsom and each man was asked to state his opinion of Newsom's work. All agreed that Newsom was an unsatisfactory employee and it was concluded that he should not be in the training course. Finally, Hathaway put the question "Should we terminate Newsom?" and each man answered in the affirmative. Hathaway then instructed Kalins to give Newsom 2 weeks' notice (R. 19; 211, 333, 367, 387, 403).

The next day Warden brought Newsom to Kalins' office. Kalins told Newsom of the decision to terminate his employment on February 15, stating in the alternative that Newsom could apply for a transfer or

resign (R. 19; 116, 213–214, 333, 338). Kalins recited the following reasons from notes he had taken at the supervisor's meeting (R. 335):

> * * * (1), does not have ability to get along with supervisors; (2), no desire to set a pace for the other men or show leadership, does not produce in accordance with ability; (3), producing measured output to just barely get by; (4), unsatisfactory workmanship, sloppiness of work, uncompleted jobs, no dependability; (5) does not fit into department setup.

Upon Newsom's request for a more specific statement of the charges against him, Kalins enumerated certain incidents, described in more detail *infra,* pp. 16–18, none of which was of recent occurrence. These were discussed, and Newsom protested that the incidents were only minor ones which were of lesser importance than many mistakes other technicians had made (R. 19; 117, 335). He said that because of the move to organize the department, his discharge had a bearing on the other technicians, and he requested a meeting at which all the technicians would be notified of his discharge and the reasons therefor (R. 20; 117). Later that day, technicians Fowler, Shroble, Botwinis, and Webb met with Newsom, Kalins, and Warden at station B, and Kalins restated the reasons for Newsom's discharge. According to the testimony of all those present except Botwinis,[5] the reasons were as follows: (1) Hardway, when he was respondent's efficiency engineer, once complained to Newsom about

[5] Technician Botwinis was in military service at the time of the hearing and did not testify (R. 189).

an omission in a daily log; (2) Warden once received a complaint that Newsom had neglected to adjust gauges at Silver Gate station at the request of the assistant station chief; (3) Newsom had installed gauges on a turbine, leaving crayon marks on the dial faces; and (4) in December 1950, Newsom had failed to discover an inoperative mechanism during a routine check (R. 20; 119–126, 165, 174, 185).

In the presence of the other technicians Newsom gave an explanation of each incident as it was mentioned (R. 20; 119–126). When Kalins invited the technicians to express their views concerning Newsom's discharge, Fowler said that "the men were all together in this thing" and he felt the Company might be firing Newsom in order to break up their organizational efforts (R. 20; 124, 217, 336–337).

Several days later, Warden admonished Newsom not to talk to any employee during working hours about the disciplinary action being taken against him and told him that if he did so, he would be discharged forthwith (R. 27; 127–128). And a few days before February 15, Kalins attempted to persuade Newsom to resign, stating that this "would make things easier" and, besides, Newsom might then be entitled to collect his vacation pay (R. 27; 128). During this period also, Kalins declined to promote technician Webb to a higher classification because "the union activity had changed the picture and they didn't know what would happen until things were settled" (R. 27; 180–181).

At the expiration of the 2-week notice period, Newsom refused either to resign or to request a transfer,

and on February 15, respondent discharged him (R. 20–21; 115).

Newsom had been in respondent's employ almost 3 years prior to his discharge (R. 11; 101). He first served 8 months as a helper in the maintenance department and then was promoted in October 1948 to the position of instrument technician, grade B (*ibid.*). He was the oldest in point of seniority of the five technicians in his department (R. 11; 102, 159, 172, 182).

Despite the alleged deficiencies in Newsom's work existing throughout his tenure as a technician but mostly during the early part of his tenure (see more detailed discussion, *infra,* pp. 16–20), John T. Hardway, respondent's efficiency engineer until the end of August 1950 when he re-entered the United States Navy, testified that on the date he left there was not sufficient reason to discharge Newsom (R. 298). Moreover, when Hardway returned to visit the plant in December 1950, he told Newsom: "It looks like this war may involve us too, and if you and the rest of us return, remember this, Newt, there is a place for you in the instrument department. I don't care whether you go back in the Merchant Marine, the Navy, or what, but there is a place for you in the instrument department" (R. 26–27; 132).

Station Chief Campbell, similarly in effect acknowledged the satisfactory character of Newsom's services when he told Newsom about a week before the effective date of Newsom's discharge that he should not be "broken hearted" over his plight, adding that he,

Campbell, had recommended Newsom very highly a year or so before and was sure that Newsom would make his mark in the world, for Newsom was strong, versatile and able (R. 27; 129). Respondent's respect for Newsom's ability as a technician was likewise displayed around the first of 1951,[6] before it learned of Newsom's leadership in the union movement. Upon that occasion Warden assigned Newsom to certain "routine" work, explaining that he disliked burdening Newsom with that type of work but Newsom was the only man in the department capable of doing that work satisfactorily (R. 27; 108).

Under all the circumstances, the Board concluded that "even assuming shortcomings in Newsom's work, it was not the shortcomings but his Union activities which led to his discharge" (R. 26, 94). It accordingly found that respondent had discriminated against Newsom in violation of Section 8 (a) (3) and (1) of the Act (R. 94).

II

The Board's order

The Board ordered respondent to cease and desist from the unfair labor practices found; to reinstate Newsom to his former position with back pay, to make available to the Board upon request all records necessary to compute the back pay due; and to post appropriate notices of compliance (R. 95–97).

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[6] The Trial Examiner inadvertently referred to this date as 1950 (R. 27; 108, 167, 201).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) of the Act by threatening to discharge the instrument technicians if they continued their union activities.

2. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (3) and (1) of the Act by discharging Cosby M. Newsom because of his union activity.

ARGUMENT

I

Substantial evidence supports the Board's finding that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act

It is rudimentary that an employer who threatens his employees with discharge if they continue their union activities thereby violates Section 8 (a) (1). Moreover, there can be little question, on this record, that substantial evidence supports the Board's finding that Warden on January 16, threatened the technicians with discharge in retaliation for their organizational efforts.

It is undisputed that Warden met Newsom, Fowler, and Shroble as they arrived at work that day, *supra,* p. 5. Warden then learned for the first time that the technicians had petitioned for union representation (R. 207). His attitude, formerly one of sympathy, changed to pessimism. And, apparently motivated by the news he had just heard, he told the technicians that they should get their personal affairs in order

because they might have to look for new jobs, *supra*, p. 5. Despite Warden's denials that he meant to threaten the employees with loss of jobs because of their union activity, the record shows clearly that his words were interpreted by the men as such a threat. All three technicians present testified that he said they might lose their jobs, and that his warning made them think about the possible consequences of their action (R. 115, 169, 187). Cf. *N. L. R. B.* v. *W. T. Grant Co.*, 199 F. 2d 711, 712 (C. A. 9).

To the same effect is the testimony concerning Warden's statement that the technicians were perhaps not qualified to compete for jobs in the market, *supra*, p. 5. Here, too, Warden clearly meant that the technicians might be forced to look for other jobs.

The testimony concerning this incident thus makes it clear that respondent, through Warden, threatened the technicians with discharge if they continued to organize, and that the Board's findings in this respect are supported by substantial evidence.[7] There was a

[7] Respondent contends that even if Warden made the statements attributed to him, he did not represent respondent in that instance and it cannot be responsible therefor (R. 49). Here respondent is plainly in error. It is unquestioned that Warden, as respondent's instrument engineer, is the immediate supervisor of the instrument technicians and as such assigns and oversees the technicians' work (R. 122, 191, 243). Obviously, as to them, he is an integral element of respondent's chain of command. The fact that Warden is not at or near the top of respondent's management hierarchy is immaterial so long as the employees reasonably consider him a representative of management. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80. Moreover, the record shows that throughout this case Warden acted as a member of management. Such conduct alone makes his acts those of the employer,

conflict in the testimony concerning Warden's statements to the technicians, but the Board properly adopted the credibility findings of the Trial Examiner, whose decision on such questions should be accepted "for obvious reasons." *N. L. R. B.* v. *State Center Warehouse & Cold Storage Co.,* 193 F. 2d 156, 157 (C. A. 9); see also *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 496.

II

Substantial evidence supports the Board's finding that respondent discharged Cosby M. Newsom for his union activities in violation of Section 8 (a) (3) and (1) of the Act

A. The basis for the Board's conclusion that Newsom was discriminatorily discharged

The evidence summarized above, pp. 5–10, shows that employee Newsom, despite almost 3 years' service, was discharged by respondent 2 weeks after the technicians' union activity, in which he was a leader, began. Respondent contends, however, that Newsom was discharged for unsatisfactory work; and it asserted at the time of the discharge and at the hearing evidence of several stale incidents which, it urges, are examples of Newsom's "incomplete," "inaccurate," "sloppy," and "spasmodic" work (R. 193, 214, 227, 230–231, 240, 385). After considering these incidents the Board properly concluded, as we shall show, *infra,* pp. 14–21, that they did not furnish persuasive support for respondent's contention that Newsom's work was unsatisfactory (R. 93–94).

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as this Court declared in *N. L. R. B.* v. *Security Warehouse and Cold Storage Co.*, 136 F. 2d 829, 833; and *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 787.

The recitation of respondent's criticisms of Newsom, *infra,* pp. 16–20, shows that the incidents assigned as "causes" for his discharge run back 2 full years. Newsom was retained in respondent's employ for nearly 3 years, during practically all of which time he served as an instrument technician. Despite these incidents, Newsom had become respondent's senior technician before his discharge.

It is significant that none of these incidents occurred near the date of Newsom's discharge except, perhaps, alleged errors or omissions in the preparation of some records, which were not discovered by Warden until after Newsom's discharge (see *infra,* p. 18) and which consequently could have played no part in the decision to discharge Newsom. In January 1951, moreover, despite his alleged deficiencies, Newsom was told by Warden that he was the only man who could handle routine work at both stations, and was selected to instruct Webb in routine at Silver Gate station (R. 108, 167, 201).

Witness Hardway, who was formerly respondent's efficiency engineer and who criticized Newsom's work, *infra,* p. 17, testified that in August 1950, when he left respondent's employ to enter the armed services, there was not sufficient reason to discharge Newsom (R. 298). And he assured Newsom as late as December 1950 that there would always be a place for him in the instrument department (*supra,* p. 9).

These statements and respondent's actions are inconsistent with its strenuous assertions that the incidents cited by it as the reasons for the discharge were taken seriously by it when they occurred, or that New-

som's discharge was contemplated as early as September 1950, as respondent contended at the hearing (R. 197). Obviously, in the face of such inconsistencies, the Board properly concluded that respondent's conduct prior to the disclosure of Newsom's union activity is the better evidence of Newsom's performance.

Respondent's contention that Hathaway decided to discharge Newsom only after hearing the supervisors' unfavorable reports at the January 30 meeting ignores Hathaway's testimony that before that date he asked Noble's permission to dismiss Newsom (R. 370–371).[8] This discussion between Hathaway and Noble occurred subsequent to January 15, when respondent first learned of Newsom's union activity. These facts, taken in conjunction with Noble's statement that the Company might have objections to the technicians' joining a union, *supra,* p. 4, and Warden's threats that they might have to look for new jobs, furnish an adequate basis for the Board to infer that Hathaway's decision to discharge Newsom was motivated by Newsom's union activity. *N. L. R. B.* v. *Robbins Tire & Rubber Co., Inc.,* 161 F. 2d 798, 801 (C. A. 5).

The record is devoid of any incident occurring near January 30 to prompt Newsom's dismissal, except his union activity. In these circumstances and in the absence of any persuasive explanation, the adverse inferences to be drawn are plain. Here, as in other cases, the Board may properly conclude that "There is real significance in the time that [respondent]

[8] On the basis of this testimony, the Trial Examiner and the Board found that Hathaway decided prior to January 30 to discharge Newsom (R. 28–29).

elected to revive an ancient (and apparently forgotten) complaint, and make it serve as the proffered excuse or reason for [Newsom's] discharge." *Peoples Motor Express Co.* v. *N. L. R. B.,* 165 F. 2d 903, 906 (C. A. 4).

Even if some of the faults respondent finds with Newsom's work are valid, they do not furnish persuasive support for respondent's defense. "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N. L. R. B.* v. *Wells, Inc.,* 162 F. 2d 457, 460 (C. A. 9). Here, the inconsistencies of the employer's conduct, the minor character of Newsom's errors, and respondent's long toleration of his faults, support the Board's view that "in the light of his long service with [respondent], it was reasonable to conclude that the difficulties inherent in [Newsom's] case only became seriously insupportable to his employer when he became [interested in] the Union, and that his discharge * * * was directed more at his unionism than at his peculiarities." *Agwilines, Inc.,* v. *N. L. R. B.,* 87 F. 2d 146, 154 (C. A. 5). As we show below, a close examination of the nature of the incidents allegedly motivating Newsom's discharge emphasizes the correctness of this conclusion.

B. The incidents relied upon by respondent

In support of its criticisms of Newsom's work as "inaccurate," "sloppy," and "spasmodic," respondent cites evidence that early in 1949 Newsom spent a lot of time in his office at Silver Gate station rather than at the "scene of the work" (R. 397); that in October

1949, Newsom was absent from work for three days without giving advance notice to the Company (R. 222);[9] that early in 1950, Newsom neglected to calibrate a gauge at the request of an assistant station chief, Mr. Prout (R. 121);[10] that Hathaway received complaints of horseplay by Newsom early in 1950 (R. 360); that operators at Station B complained to Campbell early in 1950 that control equipment was not being efficiently maintained (R. 383);[11] that about June 1950, Hardway and Warden verbally chastised Newsom for having omissions in his daily log reports (R. 119, 291);[12] that later in 1950 Newsom left crayon marks on the face of certain gauges he installed (R. 123, 137);[13] that during a routine check in December 1950, Newsom failed to discover an inoperative air-flow draft mechanism which, although it could not have caused any damage, would have prevented the

[9] Newsom testified that he was sick on this occasion and that he did not give notice because no telephone was available (R. 424). Warden made no complaint at the time (*ibid.*).

[10] Newsom testified that he in fact adjusted three of four gauges pursuant to Prout's request by "sandwiching" them in between other work, and that he explained this to Warden's satisfaction at the time (R. 122).

[11] Despite Campbell's testimony criticizing Newsom's work, the record shows that during a conference with Newsom shortly after the discharge Campbell said that Newsom would "make his mark" in the world since he was "strong, versatile and able" (R. 129).

[12] Other technicians also testified, as the Board noted, that their logs were often incomplete (R. 27; 167, 176, 186). As Fowler said, log omissions were not generally considered serious (R. 186).

[13] Both Newsom and Shroble testified that this work was done on Saturday when Warden had directed that overtime be minimized, and also that since the equipment was to be painted before its operation another cleaning would be required (R. 123–124, 166).

successful operation of the boiler (R. 126, 252–253).[14]

In its attempt to show that Newsom was inefficient, respondent was unwilling to rely upon the evidence before it at the time it discharged Newsom; it produced, in addition, evidence which it did not discover until after Newsom was discharged (R. 441–454). This evidence consisted of several test reports prepared by Newsom on standard forms.[15] Warden described in detail the errors which appear in those records (R. 223–240, 277–283). The Trial Examiner concluded that these errors could not have motivated Newsom's discharge in view of Warden's admission that they were not discovered until February 1951, after Newsom was dismissed (R. 22; 227–228, 232, 234). The Board, however, considered the records and all the relevant testimony and found that the errors would not mislead the skilled persons who used the records. Accordingly, it concluded that the records were not persuasive evidence that Newsom was an unsatisfactory employee (R. 93–94).

An examination of the records demonstrates the reasonableness of the Board's conclusion (R. 223–240, 277–283, 409–422). Respondent complains that on pages 5 and 6 of the records Newsom did not make duplicative entries of certain lever settings which,

[14] In marked contrast to this harmless mistake is Fowler's testimony that he once left all the fuses out of a set of meters, an error which was serious because it was then impossible to ascertain whether the boilers were operating properly (R. 186).

[15] The instrument technicians prepare such reports as a part of their routine work to show the results of various electrical, mechanical, and chemical tests and to record operating data. Their duties are summarized in Respondent's Exhibit 1 (R. 141).

once adjusted, remain static (R. 412, 433–434, 444–445). This was common practice (R. 435), and was not misleading. On page 6 certain figures on excess airflow are not within the normal standards of operation, but these figures only reflect faulty operation of the equipment at the time the test was made and do not indicate that Newsom erred in recording the figures (R. 413, 445). Pages 7, 8, and 9 show that Newsom did not physically correct certain erroneous titles on the printed forms, but this seems unimportant since those who used the reports knew the proper titles (R. 415, 436, 446–448). These pages, which reflect only a part of the tests (R. 414), also show certain omissions which should have been entered by another technician and a column of figures entered slightly out of line, which does not impair the value of the report (R. 415, 418–419, 447).

Page 10 shows a flow chart which respondent asserts Newsom read inaccurately (R. 234–235, 449). The different results reached by Warden and Newsom, however, merely reflect different methods of reading the chart; Newsom recorded his reading of the chart as the pen progressed, while Warden took the average of all the readings during the test period (R. 235, 417). Page 12 refers to an incident in which Newsom is said to have signed Webb's name to a report without authority (R. 220, 451). Newsom pointed out that the handwriting in the column does not appear to be his (R. 420–421), and in any event it seems improbable that this matter could be regarded as serious. Pages 13, 14 and 15, in comparison with

page 1, show merely that certain duplicative entries were omitted (R. 238–241).

Respondent's reliance on this exhibit to support its contention that Newsom was discharged for his poor work overlooks a significant part of Warden's testimony. Warden admitted that in compiling the exhibit he examined all of the numerous reports Newsom periodically made but included only those which showed errors (R. 283). Obviously the few records contained in this exhibit represent only a small part of the work Newsom produced during the 2 years he served as a technician. In the light of this testimony, the exhibit tends to rebut, rather than to strengthen, respondent's contention that Newsom's work was unsatisfactory over a long period.

On these grounds, as well as the unimportance of the alleged errors in the exhibit, we think the Board was entirely correct in concluding that the exhibit was not persuasive evidence of unsatisfactory work by Newsom (R. 94).

In summary, respondent's entire effort to show that it was motivated by the unsatisfactory nature of Newsom's work rather than by his union activities in discharging him, is, as the Board found, something less than persuasive. Especially is this so where, as here, respondent belatedly submits for the first time at the hearing evidence of the dischargee's errors which it discovered only by diligent search *after* the discharge. Such acts by the employer seem "an obvious effort to construct a case against [Newsom] and to cover up the real reason for his discharge." *N. L. R. B.* v. *Arcade Sunshine Co., Inc.,* 118 F. 2d 49, 51 (C. A. D. C.), certiorari denied, 313 U. S. 567. Moreover,

considered upon the entire record, the evidence amply warrants the Board's conclusion that Newsom's discharge was motivated by his union activities. It is true that the evidence is conflicting, but "the inferences reasonably to be drawn from this conflicting evidence were for the Board to determine." *Coca-Cola Bottling Co.* v. *N. L. R. B.,* 195 F. 2d 955, 957 (C. A. 8); see also, *N. L. R. B.* v. *State Center Warehouse and Cold Storage Co.,* 193 F. 2d 156, 158 (C. A. 9).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper,[16] and that a decree should issue enforcing the order in full.

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JANUARY 1953.

[16] Respondent contends in its answer to the Board's petition that Section 10 (c) of the Act, which precludes the Board from ordering the reinstatement of any employee discharged for cause, is applicable here (R. 462). But, as we have shown, the Board found on the basis of substantial evidence that Newsom was discharged for his union activities and not for cause. Cf. *N. L. R. B.* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C. A. 4).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Supp. V, Sec. 151 *et seq.*, are as follows.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will

effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

SEC. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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